IN THE

Supreme Court of the United States

October Term, 1955

No.

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

MICHIGAN CONSOLIDATED GAS COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Panhandle Eastern Pipe Line Company (Panhandle), petitioner herein, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered August 1, 1955, affirming in part and reversing in part the judgment of the District Court.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a)* and its memorandum on petition for rehearing (App. 23a) are reported at 226 F. 2d 60. The opinion, as printed in the Appendix, was amended slightly by order of the Court (App. 22a). The opinion of the District Court (R. 1313)** is reported at 117 F. Supp. 551.

JURISDICTION

The judgments of the United States Court of Appeals for the Sixth Circuit were entered August 1, 1955 (App. 20a, 21a). In the time allowed by the applicable rule, petitioner filed a petition for rehearing which was denied October 6, 1955 (App. 22a). Issuance of the mandate has been stayed until January 4, 1956, to allow petitioner to file this petition.

Jurisdiction is conferred upon this Court by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

First Case

(1) Where a natural-gas company sues a customer for amounts due under a rate schedule on file with and accepted by the Federal Power Commission, may the defendant collaterally attack the order approving such schedule on grounds that sufficient findings were not made by the Commission when the same defendant was a party to the proceeding resulting in the order, but did not obtain direct review of the order?

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* "App." references are to the printed appendix accompanying this petition.

** "R." references are to the joint appendix prepared for the court below, copies of which are filed with this petition.

(1a) Whether, because the Commission allegedly failed to make necessary findings in adopting a new rate schedule, a court can refuse to enforce such rate schedule on file with and accepted by the Federal Power Commission, in a suit by a natural-gas company to collect the rate contained in the schedule.

(2) Where the Federal Power Commission in a concededly valid order lowers the rate level of a natural-gas company and orders that company to file new rate schedules, is it necessary that the Federal Power Commission, in a later proceeding when it accepts such new rate schedules as being in compliance with the prior order, make findings that each provision of every contract between the gas company and all of its customers which may be affected by the new rate schedule is "unjust, unreasonable," etc.?

Second Case

(1) Whether it is proper in the circumstances of this case to give to statements made in an opinion of the Federal Power Commission the force and effect of an order of the Commission when such statements do not purport to be mandatory and are couched in terms of beliefs and expectations?

(2) Whether the decision of the Sixth Circuit Court of Appeals, holding that respondent, Consolidated, could not obtain injunctive relief against Panhandle for violating an order of the Federal Power Commission until it had invoked the authority of the Commission, effectively bars, on principles of *res judicata*, the claim asserted by Consolidated by way of set-off and counterclaim to a subsequent suit, that the same order of the Commission had been violated?

(3) Where the claim asserted in defense to a suit by a natural-gas company requires the determination of the capacity of a compressor station belonging to the natural-gas company, and where the determination of that capacity is dependent upon problems in the transportation of natural gas of great complexity, may a court, in the absence of a Commission determination of the capacity of the compressor station, entertain such a claim?

STATUTE INVOLVED

SEC. 5 (a) of the Natural Gas Act provides: "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any state, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 U.S.C. § 717d(a).

PRELIMINARY STATEMENT

This petition presents questions as to the impact of the Natural Gas Act on the contractual relations of a natural-gas company and its customer, a distributing utility. In the opinions of the courts below, the controversies were treated as one case; but, in reality, two separate and distinct cases are involved. Accordingly, to simplify the presentation this petition contains a separate statement and argument for each case.

Some facts common to both cases should be mentioned preliminarily. Panhandle Eastern Pipe Line Company is a natural-gas company operating a pipe line which extends from Texas through the States of Kansas, Missouri, Illinois, Indiana, Ohio and into Michigan. Respondent, Consolidated, is a gas utility distributing gas in Michigan, principally in Detroit.

In 1935 Panhandle and Consolidated's predecessor in interest entered into a contract (R. 19a) under which Panhandle agreed to furnish all of Consolidated's gas requirements up to 90,000 Mcf per day (R. 21a). Eventually this contract became Panhandle's Rate Schedule FPC No. 12. In 1940 the maximum amount of gas deliverable under the contract was raised to 125,000 Mcf per day (R. 59a). This contract became Supplement No. 4 to Rate Schedule FPC No. 12. Consolidated's claim to 125,000 Mcf of gas a day is a common denominator of this whole controversy.

The basis for jurisdiction in the District Court was diversity of citizenship between the parties in a case involving more than $3,000. A further jurisdictional basis is found in Section 22, Natural Gas Act, 15 U.S.C. Section 717u.

STATEMENT OF THE FIRST CASE[1]

In September, 1942, the Federal Power Commission entered an order requiring Panhandle and its subsidiaries to reduce their rates and charges and to file new schedules embodying this reduction (R. 1129a). This order was ultimately affirmed by this Court on April 2, 1945. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635.

The 1942 order required Panhandle and its then subsidiaries to " . . . file new schedules of rates and charges for or in connection with their transportation and sale of natural gas in interstate commerce" (R. 1135a). In May, 1945, Panhandle tendered such rate schedules (R. 967a, 1140a). The Commission, in June of that year, notified all interested persons and requested comments or suggestions concerning the proposed schedules. Numerous letters were received from state regulatory commissions, customers of Panhandle, and other interested persons.

In July, 1945, the Commission advised Panhandle that the schedules filed in May were not acceptable;[2] that it did not feel that a straight commodity form of rate was proper under the circumstances; and, that it had directed its staff to confer with Panhandle for the purpose of considering another type of rate (R. 1141a). Among the considerations which had been urged upon the Commission by those commenting upon the May proposed schedules was a limitation on Pan-

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[1] In the opinion below this case was referred to as "Counts I, II, III and V" of the complaint.

[2] There was never any question that the May schedules adequately reduced the level of the rates (R. 782a).

handle's maximum daily delivery obligation to certain customers (R. 1140-41a).

Thereafter Panhandle tendered for filing on September 12, 1945, revised proposed schedules of rates and charges.[3] In a letter dated September 11, 1945 (Defendant's Exh. No. 8, 1149a, not printed, but in original record on file with the Clerk) Panhandle called the attention of all of its customers (including Consolidated) to pertinent provisions of the new schedules which accompanied the letter, stating:

> "Attention is called to the following provisions of the schedules:
>
> "(1) Distributors . . . may switch to a firm basis gas heretofore purchased on an interruptible basis to fulfill the present requirements of individual customers using less than one million two hundred thousand (1,200,000) therms per year.
>
> "(2) Requirements of customers whose annual use of gas exceeds one million two hundred thousand (1,200,000) therms must be purchased on an interruptible basis unless such requirements had previously been supplied to the distributor by the Company on a firm basis.
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> "(3) Any additional commitment for gas for resale by the distributor to any individual customer whose annual requirement exceeds one million two hundred thousand (1,200,000) therms will be classified as 'interruptible.' "

On September 14 the Commission directed that a public hearing be held on September 24 with respect to (1) whether the revised rate schedules should be

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[3] On October 22, 1945, minor amendments to these schedules were filed; and it is to the schedules as amended that the Commission ultimately referred (R. 971a). The changes are not material.

allowed to take effect in whole or in part, and (2) whether all or any part of such revised rate schedules should be rejected (R. 1142a). In this order the Commission found that:

> "Panhandle has sent a copy of the revised proposed rate schedules to each of the State commissions concerned, its distributors, and to counsel for each of the parties in the above-docketed matters." (R. 1141a)

Notice of the hearing with respect to the proposed rate schedules was published in the Federal Register (R. 1081a). After the hearings were held the Commission found that all parties were given full opportunity to be heard

> "... with respect to reasonableness and propriety of the revised rate schedules tendered for filing in purported compliance with the Commission's interim order of September 23, 1942 . . ."

and, that no testimony was offered in criticism of the proposed rate schedules "either as to form or substance" (R. 969a).

In its order of November 2, 1945, the Commission found that the new schedule was in compliance with its 1942 order and with the provisions of the Natural Gas Act; and that it should be accepted for filing and made effective as to all bills regularly rendered on and after November 1, 1942 (R. 971a-972a). The supplement approved by the order of the Commission for Consolidated became Supplement No. 5 to Rate Schedule FPC No. 12. The supplement, a part of the overall rate reduction included "Rate Schedule Gd-1 Deliveries to Utilities—Firm, Resale" and "Rate Sched-

ule Rd-2 Deliveries to Utilities—Interruptible, Resale" (R. 61a *et seq.*). See note 5, *infra.*

The new rate schedule thus approved by the Commission provided for a differential form of rate for deliveries made on a firm basis, that is, a base load rate and a rate for purchases in excess of the base load. The base load was to be determined by the daily average deliveries of therms[4] during the months of June through September. This daily base load was then to be applied to the succeeding twelve months according to the number of days in a billing month. The resulting figure was the base load for such month, and Consolidated was to be charged at the rate of 1.85 cents per therm for any amount of gas delivered up to the base load. Deliveries in excess of the base load were to be billed at a higher rate of 2.6 cents per therm.

An integral part of the differential rate was the provision that:

> "(c) This rate schedule shall not apply to gas purchased by the Utility from the Company for resale to any individual customer whose present, or estimated, annual use of gas exceeds one million two hundred thousand (1,200,000) therms, unless such gas requirements were purchased by the Utility from the Company on a firm basis prior to October 1, 1945." (R. 61a)

The nub of Panhandle's complaint was that by taking gas in violation of the above provision during the four-month base periods, Consolidated improperly inflated its base load and that therefore it should have paid the rate provided in the schedule for gas taken

[4] A therm is a measuring unit which reflects the heating value of gas.

in excess of the properly calculated base load during the succeeding months.[5]

There can be no doubt that the Federal Power Commission actually, by its order of November 2, 1945, put into effect all of Supplement No. 5 to Rate Schedule FPC No. 12, that is, the new schedule which Panhandle had submitted. The order of the Commission makes it clear that the entire schedule as proposed by Panhandle was to go into effect (R. 965a), and the Commission ordered that:

> "The supplements to its rate schedules tendered for filing by Panhandle Eastern Pipe Line Company on October 22, 1945, and more particularly described in the Appendix A hereto attached and made a part hereof, be and the same are hereby accepted for filing in compliance with the Commission's Opinion No. 80 and interim order of September 23, 1942.
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> *"The supplements to rate schedules referred to in paragraph (a), above, be and the same are hereby made effective as to all bills regularly rendered on and after November 1, 1942."* (R. 972a) (Emphasis supplied.)

The 1,200,000 therm limitation had been debated at length during the hearings which led up to the issuance of the Commission's November 2, 1945, order. At the hearings in September, 1945, testimony was given

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[5] The opinions below create some confusion by referring to interruptible rate schedules (Rate Schedule Rd-2 of Supplement 5 to Rate Schedule FPC No. 12). However, during the period involved no sales or deliveries of gas were made by Panhandle to Consolidated under such schedule and this has been admitted (R. 128a).

on the provision; counsel for various parties, including counsel for Consolidated (which was a party actively participating), discussed and argued this very provision without ever claiming either that it was not properly before the Commission or that the provision would not be effective upon adoption by the Commission of the new schedule. The record is clear on this point (R. 780-782a, R. 930-945a), and neither of the courts below has ever asserted that the 1,200,000 therm limitation was not adopted in the Commission's November 2, 1945 order.

At the beginning of the period in question Panhandle had no way of either discovering or physically preventing Consolidated from violating the rate schedule. It was only in the middle of 1948, after the Commission found that Consolidated was violating the rate schedule, that Panhandle was ordered to install facilities to control the flow of gas (R. 211a-212a, 234a).

Events subsequent to the order of the Commission adopting the new rate schedule bring into sharper focus the problem presented to this Court. Beginning in June, 1947, it became apparent that Consolidated was violating the 1,200,000 therm limitation of the rate schedule (R. 1222a-1234a). And on August 16, 1947, the Commission so found (R. 1030a). On August 19, 1947, the Commission filed an action in the District Court for the Eastern District of Michigan asking for an injunction against the violation of the rate schedule; but, this suit was dismissed by stipulation of the parties (R. 88a-91a).

No valid appeal was taken by Consolidated from the order of November 2, 1945. No attempt to appeal that

order was made until nearly two years later when on September 8, 1947 (R. 1084a) Consolidated filed an application for rehearing of the order which the Commission denied because it was untimely filed. Consolidated's petition to review the November 2, 1945, order was dismissed by the Court of Appeals for the District of Columbia on the ground that, because the petition had not been made during the time allowed by the Natural Gas Act, it had no jurisdiction. *Michigan Consolidated Gas Company* v. *Federal Power Commission,* 167 F. 2d 264.

The instant case was commenced when Panhandle filed its complaint in July of 1948 (R. 6a) alleging violations of the applicable rate schedule and claiming amounts due for gas delivered and unpaid for at the rate for gas taken taken in excess of the properly calculated base load.

The Court of Appeals for the Sixth Circuit affirmed the District Court holding that the new rate schedule upon which Panhandle based its claim could not supersede or modify the provisions in the amended contract of 1935 relating to the quantity of gas to be delivered, since such provisions were not specifically found to be unjust, unreasonable, unduly discriminatory or preferential within the provisions of Section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a). The court held that the 1,200,000 therm provision was without "legal effect" since (App. 8a),

> "The Commission did not take the required statutory steps to put the terms and conditions of service established in Gd-1 APPLICABLE (c) into effect so as to supersede the contractual provisions

of August 31, 1935, as amended, binding on both Panhandle and Consolidated.'"[6]

ARGUMENT, FIRST CASE

Questions 1 and 1a. The threshold question in this case and a fundamental one in the administration of the Natural Gas Act is, assuming that findings under Section 5(a) were necessary but not made insofar as the 1,200,000 therm limitation is concerned, whether the order of November 2, 1945, putting the therm limitation into effect can be attacked in the present proceeding. Consolidated was a party to the proceeding leading up to this order, and, in fact, participated extensively in the hearings regarding the therm limitation. It, along with all other parties, received ample notice of everything that was done. Under the provisions of the Natural Gas Act, Section 19(b), 15 U.S.C. § 717r(b), Consolidated, as a party which might have felt itself aggrieved by the order, could have petitioned for review. It did not do so within the time allowed by the Natural Gas Act. Almost two years elapsed before it sought by direct review to test

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[6] The District Court had so held, but in addition had held that the 1,200,000 therm limitation was not related to the base load provision and that since no charge was provided for by the schedule for gas taken in violation of the limitation, he could not give judgment. This is, of course, an erroneous decision, and the Court of Appeals did not even deign to mention it. While no specific penalty is applicable to the volumes of gas unlawfully taken by Consolidated to inflate its base load, it is Panhandle's position that none is needed since the volumes so taken must be deducted in computing the proper base load— and that all volumes taken during the following winter in excess of the proper base load must be paid for at the higher differential rate specifically provided for in the rate schedule.

the validity of the Commission's action; and this review was held to have been attempted too late.

As between Panhandle and Consolidated, under the decisions of this Court, the question whether the rate schedule was validly adopted or not, is immaterial, for it is not subject to collateral attack. Consolidated has claimed—and the decision of the court below improperly substantiates this claim—that it can refuse to pay the charges imposed by the rate schedule adopted by the Commission, and attack in this proceeding the order of the Commission approving the charges. Whether or not the requisite findings were made and whether or not the order adopting the rate schedule was validly entered, are considerations completely immaterial under the present circumstances. Rather, the sole inquiry should be whether the order of the Commission putting the rate schedule into effect can be collaterally attacked in this proceeding. The court below permitted such a collateral attack and therefore, it is submitted, rendered a decision in conflict with decisions of this Court as well as other courts and courts of appeal.

In *Federal Power Commission* v. *Colorado Gas Company*, 99 L. ed. (Advance p. 401), decided March 28, 1955, the question was whether the Court of Appeals for the Tenth Circuit could, in a review proceeding, overturn a prior order of the Commission as to which no review had been sought under Section 19(b) of the Natural Gas Act. The order involved was a prior order approving a merger. In that order, as a condition to its approval of the merger, the Commission prohibited the inclusion of certain operating expenses of the natural-gas company in its cost of service. In a review of a later rate proceeding the prohibition was attacked and the Court of Appeals sus-

tained the gas company's contention. This Court said (99 L. ed. at 407) that the gas company:

> "... cannot now be allowed to attack an officially approved condition of merger while retaining at the same time all of its benefits. The impropriety of the attack is rendered twofold *because it is not made in the merger proceeding but is attempted in a separate rate proceeding.*" (Emphasis supplied.)

It may safely be asserted, although the instant case arises in a different context, that for the same reason Consolidated cannot be allowed to attack in this case the order of the Federal Power Commission approving Panhandle's rate schedules.[7]

In *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 512, the Interstate Commerce Commission, after hearing, held that the appellant was not entitled to engage in towing service under an existing certificate. A complaint in the District Court to set aside that order was filed by the appellant, claiming that the original certificate had been restricted by the amendatory order. This Court denied the appellant's right to make such an attack, saying:

> "... The appellant cannot now raise the question of the power of the Commission to modify the original certificate .... Whether the Commis-

[7] Other cases are in point. *Yakus* v. *United States,* 321 U.S. 414, 429; *Securities and Exchange Com'n* v. *Central-Illinois Security Corp.,* 338 U.S. 96, 143; *Adams* v. *Nagle,* 303 U.S. 532; *Stanley* v. *Board of Supervisors,* 121 U.S. 535, 550. In *Reconstruction Finance Corp.* v. *Lightsey,* 4th Cir., 185 F. 2d 167, 169, the court said:

> "It is sufficiently clear that appeal, where it exists, rather than collateral attack, is the remedy of parties disappointed by the decisions of quasi-judicial bodies in matters properly before it. ..."

sion's action . . . was right or wrong, the jurisdiction of the Commission was not destroyed thereby. A direct attack in such circumstances was the remedy.

". . . It [appellant] cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. . . ." (Citing cases)

Consolidated attempted, as has been indicated, to obtain a review of the order of November 2, 1945, almost two years after the date of the order; and, it specifically assigned the question whether the therm limitation was validly adopted (R. 1084a-1085a). *Michigan Consolidated Gas Co.* v. *Federal Power Commission,* 167 F. 2d 264. The Court of Appeals for the District of Columbia, on motion to dismiss, dismissed the petition for review, stating:

". . . Since neither the petition for review nor the application for rehearing was filed within the time allowed by the Natural Gas Act . . . [§ 19(b)] we lack jurisdiction to review these orders."[8]

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[8] In *Michigan Consolidated Gas Co.* v. *Federal Power Commission,* 3d Cir., 203 F. 2d 895, 901, Consolidated sought to review other orders of the Commission prescribing Panhandle's obligation to deliver gas. It was contended that the Commission had acted arbitrarily in refusing to allot Consolidated any portion of Panhandle's increased capacity, although Panhandle's new "rolled-in" rate had been imposed upon Consolidated. The Court of Appeals said:

". . . This contention is in reality an attempt by Michigan Consolidated to attack indirectly and collaterally the Commission's Opinion No. 214 and accompanying order which approved the 'rolled-in' rate. But that opinion and order have long since become final and not subject to review."

The decision of the court below is in conflict with these cases, and accordingly, this petition for certiorari should be granted. Both courts below suggested that Consolidated may have been misled; but the Court of Appeals held that "this consideration is not conclusive" (App. 12a). Even if it were assumed that Consolidated was misled, a collateral attack could not be allowed. Moreover, it is clear (see pp. 7-8 and pp. 10-11, *supra*) that Consolidated *could not* have been misled.

If the decision of the court below remains the law, the validity of every rate schedule on file with the Commission is suspect and could be collaterally attacked at the whim of any distributing company notwithstanding it may have been a party to the proceeding leading up to the adoption of the rate schedule.

The rates of every natural-gas company must be filed and kept on file with the Commission. Sections 4(c) and (d), Natural Gas Act, 15 U.S.C. § 717c(c) and (d). Subsection (d) provides that unless the Commission otherwise orders,

> "... no change shall be made by any natural-gas company in any such [filed] rate, charge, classification, or service, ... except after thirty days' notice to the Commission and to the public. ..."

And, it has been consistently held, that where the rates of a natural-gas company were filed with the Federal Power Commission they are the only lawful rates which can be charged or accepted. Until changed by the Commission they are binding on all persons concerned.

Thus, in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission,* 341 U.S. 246, 251-2, this Court held that a purchaser of electricity.

> " . . . *can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.*
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its [*sic*] opinion, it is the only or the more reasonable." (Emphasis supplied.)

See also, *Phillips Petroleum Co.* v. *Federal Power Commission,* Nos. 5095, 5096, November Term, 1955, United States Court of Appeals for the Tenth Circuit, decided November 16, 1955. The only effect of the decision below is to permit Consolidated to pay a rate different from that on file with the Commission.

Thus, the decision in the court below conflicts with the collateral attack cases cited above, and, in effect, is in conflict with those cited immediately above which hold specifically that the only rate (including all conditions affecting such rate) which can legally be applied is the one on file with the Federal Power Commission. It is submitted, therefore, that on this basis alone the petition for certiorari should be granted.

Question 2. Even assuming, *arguendo,* that the court below could review the order adopting the new rate schedules, and refuse to enforce the schedule on file, Panhandle does not concede that the findings, which the courts below held were required, were necessary

in the circumstances of this case. The holding in this regard by the court below raises an important problem in the administration of the Natural Gas Act which this Court, in the interests of proper procedure in the future, should resolve.

The level of Panhandle's rates was lowered by the Commission in a valid 1942 order which was reviewed by this Court. Panhandle was ordered to file rate schedules incorporating the rate reduction. This "interim" order has been characterized by this Court as the first step in the establishment of a rate. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584. Such an order contemplates a second step, that is "the adjustment of a rate schedule conforming to that level *so as to eliminate discriminations and unfairness from its details.*" *Ibid.* (Emphasis supplied.) That is what the Commission did when, in its order of November 2, 1945, it found that the rate schedules submitted by Panhandle were "in substantial compliance" with the interim order adopting the rate level and were "in substantial compliance ... with the provisions of the Natural Gas Act, and should be accepted for filing" (R. 972a).

The question is whether it was necessary for the Commission, in approving such new rate schedules applicable to all customers of a pipe line[9] to make findings specifically abrogating each and every contract provision which may be affected thereby, however incidentally.

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[9] No one disputes the sufficiency of the finding of the Commission that the schedules were in compliance with the Natural Gas Act.

Requiring the Commission to delve into a morass of contractual provisions contained in each contract between a natural-gas company and every one of its customers would impose an intolerable burden upon the Commission and completely frustrate the effective administration of the Act. The erection of such a requirement is nowhere required by the Act. The provisions of the Act are met when the findings specified in Section 5(a) are made in a proceeding initiated by the Commission and directed toward the *level* of a natural-gas company's rates. In the circumstances of this case, the higher level of Panhandle's rates was contained in and indeed provided for by the contracts between Panhandle and its customers, and, the effect of the Commission's 1942 order was to abrogate these contractual provisions. No one could now suggest that that order was invalid because each term of each contract relating to rate level or structure was not specifically found to be unjust and unreasonable.

After a full hearing covering all the provisions of the new schedules, the Commission adopted them for sixty-six of Panhandle's then customers in the States of Kansas, Missouri, Illinois, Kentucky, Indiana, Ohio and Michigan (R. 974a-975a). The obvious intent of the Commission in directing the filing of *new* schedules and of having its staff participate in their preparation, and in holding hearings regarding them was to develop a workable, uniform *rate schedule* applicable to all the customers along the line.[10] Such a procedure would not only eliminate differences

[10] Such a procedure was entirely wasted if all that could be done was to lower the rate. It would not be necessary to have *new* rate schedules if the only thing to be changed was the price of gas.

and discriminations—affecting the rate level—contained in various contractual provisions antedating passage of the Natural Gas Act,[11] but would permit the adopting of a new, uniform method of selling gas. It could hardly be expected that the Commission would attempt to set a separate reasonable rate to be charged to each of Panhandle's customers.

No case found supports the conclusion of the court below. *Sierra Pacific Power Co.* v. *Federal Power Commission*, 223 F. 2d 605, and *Mobile Gas Service Corp.* v. *United Gas Pipe Line Co.*, 215 F. 2d 883 (see note 13, *infra*) might be said to support the decision of the court below by inference. However, those cases involve the situation where there was no antecedent finding of the Commission regarding the rate level of the natural-gas company.[12]

The importance of this fundamental problem in the administration of the Natural Gas Act, a problem which will be constantly recurring, is manifest. Every natural-gas company (including independent producers now) is subject to a complaint and a proceeding to reduce its rates.

The Court presently has pending before it four connected cases[13] involving the situation where a natural-

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[11] *Natural Gas Pipeline* case, *supra*.

[12] It may also be observed as to these cases, that both involved direct appeals from the agency and are distinguishable on that basis.

[13] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation and Federal Power Commission*, No. 17, October Term 1955; *Federal Power Commission* v. *Mobile Gas Service Corporation*, No. 31, October Term 1955; and *Pacific Gas and Electric Company* v. *Sierra Pacific Power Company*, No. 53, October Term 1955; *Federal Power Commission* v. *Sierra Pacific Power Company*, No. 51, October Term 1955.

gas company or an interstate carrier of electricity has filed a new tariff which increases contract rates. In each case one of the primary issues is whether a contract on file with the Federal Power Commission remains legal and binding until and unless such contract is found specifically to contravene the provisions of the Act. Those cases arose under Section 4 of the Natural Gas Act and Section 205(a) of the Federal Power Act, which contemplate the so-called "filed rate" procedure. The question in these cases is related to that in this case, since if this Court reverses the decisions of the Third Circuit and especially the Court of Appeals for the District of Columbia, it would follow that rate schedules voluntarily filed by Panhandle and accepted for filing by the Commission were necessarily binding upon Consolidated.

However, the converse is not true. The instant case arose under Section 5(a) of the Natural Gas Act and involves, as we have pointed out, the second step in the rate-making procedure. It is submitted that all necessary findings had already been made when the Commission adopted the new schedules.

The rates which the Commission in its 1942 order had found to be "unjust, unreasonable and excessive" in connection with the transportation of natural gas (R. 1135a) were found in existing contracts between Panhandle and its customers, and by its order of November 2, 1945 (R. 965a, 972a) the Commission found that the rate schedules tendered were in substantial compliance with its prior order and with the provisions of the Natural Gas Act and should be accepted for filing. These findings comply strictly with the requirements of Section 5(a) of the Natural Gas Act, for the Commission (a) found that Panhandle's rates

incorporated in existing contracts, were unjust and unreasonable, and (b) by its order of November 2, 1945, determined in the language of Section 5(a) the "just and reasonable rate, charge, classification ... or contract to be *thereafter* observed and in force." (Emphasis supplied.) If the Commission is to be allowed, as it was by the decision of this Court in the *Natural Gas Pipeline* case, *supra,* to enter upon a procedure involving successive stages in fixing the rates, the findings mentioned above should be adequate to support the adoption of Panhandle's new rate schedules.

Moreover, the decision of the court below is predicated upon a hypertechnical distinction between the rate level and "terms and conditions of service" (App. 9a-12a). We do not view, and it seems clear that the Commission did not view, that the therm limitation contained in the rate schedules was a term or condition of service. In the order of November 2, 1945 (R. 965a, 968a) approving the rate schedules, the Commission stated that "the hearing was limited to matters relating to proper rates which would comply with the Commission's interim order of September 23, 1942." Still later, on August 6, 1946, the Commission entered an order fixing a date of hearing to be held concerning appropriate terms and conditions of service, including rules and regulations to govern curtailment and interruption of gas service "to be embodied in present effective rate schedules filed by Panhandle" (R. 1146a). It was found that the Commission had not, up to that time, dealt with "terms and conditions of service."

Thus, the Commission did not view the therm limitation as a term or condition of service. Rather it was regarded (by the Commission and everyone for that matter) as a part of the *rate structure;* and, it was approved as such.

Moreover, no provision in the rate schedule prevented Consolidated from taking the contract volume of gas. The rate schedule provided in effect that the base load would not include gas taken in order to serve an individual customer more than 1,200,000 therms; and if gas was so taken on a firm, rather than an interruptible basis, the rate would be 2.6¢ per therm. It is submitted that Consolidated cannot, especially now, accept the benefits of an order reducing the rates which its contract bound it to pay, and at the same time attack the rate classification established by the order.[14] *Callanan Road Improvement Co.* v. *United States,* 345 U.S. 507, 513, and cases cited; *Federal Power Commission* v. *Colorado Gas Co.,* 99 L. ed. (Advance p. 401).

The fundamental question presented to the Court, therefore, is whether the findings made by the Commission in 1942 at the first stage of the adoption of a rate can support the action taken by the Commission during the second stage of the rate fixing. The decision of the court below is unrealistic in that it fails to give proper weight to practical necessities in the administration of the Natural Gas Act. Congress cannot have intended to so hamstring the Commission in the exercise of its proper functions.

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[14] The Commission found on November 2, 1945 (R. 972a):

> "The rate schedules tendered for filing by Panhandle and designated as supplements to existing rate schedules on file with the Commission . . . provide a reduction in annual revenue *in excess* of $5,094,384 per annum as provided in the Commission's Opinion No. 80 and interim order of September 23, 1952 . . . ." (Emphasis supplied.)

The therm limitation was an integral part of that rate reduction.

Aside from the fact that requiring findings such as those envisioned by the court below as to each and every provision of every contract between a natural-gas company and its customer is unrealistic and unreasonable, it is clear that the decision of the court below fails to give proper weight to the findings actually made by the Commission. If the decision of the court below is allowed to stand, it will be clear that even though the Commission validly adopts a *rate structure*, it cannot classify service for purposes of that rate structure and this holding, we think, is at once an egregious error and one which should be reviewed by this Court.

STATEMENT OF THE SECOND CASE[15]

Panhandle, by its complaint as supplemented (R. 142a, 322a), sought to recover over $600,000 for deliveries of gas to Consolidated during the months of July through October, 1948. Consolidated admitted that the payments were due to Panhandle (District Court Opinion, R. 1324a). However, it contended that Panhandle's deliveries during this period fell below the 125,000 Mcf per day required by the 1935 agreement between Panhandle and itself, and that under the agreement it was entitled to withhold certain amounts from such payments as a set-off against its cost of manufacturing gas to compensate for Panhandle's allegedly deficient deliveries.[16] Consolidated

[15] This case was referred to in the opinion below as "Counts IV and VI" of the complaint.

[16] The set-off and counterclaim were claimed to arise under paragraph 4, Article XVIII of the 1935 agreement (R. 39a) and under Article XV (R. 35a).

also counterclaimed for an amount over and above the set-off claimed.

The alleged deficient deliveries were the result of Panhandle's compliance with an order of the Commission issued in July of 1948. For a specified emergency period, Panhandle was in effect ordered to curtail deliveries to Consolidated. The controversy in this case involved an attack by Consolidated on this order and on a supplemental opinion in connection therewith. In the alternative, Consolidated claimed that Panhandle violated the Commission's order and was, accordingly, liable by way of set-off and counterclaim to the extent of such violation under the 1935 contract, (Note 16, *supra*) for the cost of manufacturing gas to make up the deficiency in deliveries.

On July 17, 1948, the Commission handed down its Opinion No. 166 and accompanying order. The proceedings there involved were separate from and for a different purpose than those attendant upon the 1,200,000 therm limitation. The Commission temporarily suspended the contractual obligation to deliver to Consolidated up to 125,000 Mcf per day. The Commission, after hearings directed Panhandle to file a supplement to its rate schedule[17] and provided that it should make available to Ohio Fuel Gas at a point east of Panhandle's Edgerton compressor station an additional 10,000 Mcf of gas per day,[18] that Panhandle should make deliveries to Consolidated and to Michigan Gas Storage Company of such volumes of gas as might be available after making deliveries to all of

[17] This became Supplement No. 11 to Rate Schedule FPC No. 12.

[18] Delivery of this gas had been requested by the War Production Board to ameliorate an existing shortage of gas (R. 175a).

its other customers east of the Edgerton station, including those to Ohio Fuel, in accordance with certain percentages of such available volume of gas. See FPC Opinion No. 166 (R. 172a, *et seq.*).

The Commission first found that the practice of Panhandle in permitting Consolidated to take 125,000 Mcf a day had the effect of granting to Consolidated an undue preference and advantage while, at the same time, subjecting other customers to undue prejudice and disadvantage (R. 206a). In its opinion, the Commission noted that previously, it had ordered Panhandle to deliver specified volumes of gas to Michigan Gas Storage Company (R. 203a) because up to that time Consolidated had never taken the maximum allowed by its contract.[19] The Commission then concluded that it was unreasonable that Consolidated receive the maximum volumes under its gas purchase contract while deliveries to other customers such as Gas Storage were limited to only a portion of the gas to which they were similarly entitled (R. 206a).

The Commission in this proceeding was attempting to utilize Panhandle's full capacity and make an equitable distribution of gas available during a period of emergency shortage. The record (R. 1078a) contains a map of the Panhandle system as it existed at the time in question and reference thereto may be helpful.

In Opinion No. 166, after detailed consideration of many problems as to gas service west of Panhandle's

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[19] While the proceedings relating to Gas Storage were pending before the Commission, Consolidated undertook interruptible sales to industrial customers which resulted in its taking up to the 125,000 Mcf maximum and placing in storage the difference between that amount and its firm demands (R. 204a-205a).

Edgerton compressor station, the Commission reached in its discussion "The Situation East of Edgerton" (R. 190a).[20] It found that the total requirement on Panhandle's system east of its Edgerton station would be 300,000 Mcf per day during the summer months (R. 190a). Later, discussing the two main customers east of Edgerton, the Commission stated in relation to their claims to take gas,

> "... If Consolidated is entitled to take 125,000 Mcf a day, then Gas Storage is entitled during the storage season to take 100,000 Mcf a day. *The difficulty is that there is not 225,000 Mcf of gas a day available for distribution between them.*" (R. 206a) (Emphasis supplied.)

One of the problems which confronted the Commission was the physical capacity of the Edgerton station. The record showed that the physical capacity of that station was from 265,000 Mcf to 270,000 Mcf per day on the average (R. 191a). The opinion stated, however, that other evidence in the record indicated that larger volumes had been delivered. The Commission expressly refused to determine the capacity of the station; but, it used 270,000 Mcf per day capacity as the basis for altering the contractual obligations of the parties involved (R. 191a).

In its order adopted in conformity with Opinion No. 166, the Commission ordered (R. 233a) Panhandle to deliver to Consolidated and to Michigan Gas Storage,

> "... such volumes of natural gas as may be available after making deliveries to all of its other

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[20] The capacity of this station limits Panhandle's ability to make deliveries to all of its customers east of it. It is a gateway through which all of Panhandle's gas going into Michigan and Ohio must pass.

customers east of its Edgerton Compressor Station. . . ."

Another matter taken up in Opinion No. 166 was the petition of Michigan Public Service Commission which alleged that it was necessary for a large and continuous supply of natural gas to reach Detroit. The Commission was asked to give priority to deliveries to Gas Storage and Consolidated under their contracts before making deliveries to direct or indirect, interruptible or off-peak consumers (R. 214a-215a). The order of the Commission (paragraph (E) R. 234a) denied this petition. See Opinion No. 166 (R. 215a-216a).

Consolidated refused to accede to the Commission's order. It refused to pay Panhandle for gas delivered, claiming a set-off under the 1935 agreement for the cost of manufacturing gas to make up the difference between the contractual quantity, 125,000 Mcf per day, and the amounts actually delivered. The Commission was advised of this fact and, on August 25, 1948, issued its Supplemental Opinion No. 166A (R. 155a-158a). The Commission stated:

" . . . We expressly found from the record in these proceedings that the volumes of natural gas available to Michigan Consolidated from Panhandle during the period May 15, 1948 to October 31, 1948, *would be less than the 125,000 Mcf per day and in Paragraph (B) of our order of July 17, 1948, provided the basis upon which deliveries are to be made to Michigan Consolidated.*

"Clearly, our order of July 17, 1948, modifies the obligation of Panhandle to deliver 125,000 Mcf per day to Michigan Consolidated at Detroit and the invoking by Michigan Consolidated of Paragraph 4 of Article XVIII of the contract of

> August 31, 1935 (Panhandle's rate Schedule FPC No. 12) *is precluded by such order.* Furthermore, the action of Michigan Consolidated under Paragraph 4 of Article XVIII of the contract of August 31, 1935 (Panhandle's Rate Schedule FPC No. 12) and the action of Panhandle in increasing deliveries of natural gas to Michigan Consolidated through reduction of deliveries to other customers is contrary to and in violation of the Commission's orders issued herein and the provisions of the Natural Gas Act." (R. 157a) (Emphasis supplied in part.)

After the issuance of this opinion, Consolidated brought an action for an injunction to compel Panhandle to deliver 125,000 Mcf of gas to it and to construct facilities necessary to do so. Among the complaints alleged by Consolidated in that case was that Panhandle was,

> "... operating its pipe line system in such a way that the daily deliveries of natural gas into and through the Edgerton Station to defendant's customers, including plaintiff, east thereof are less than the maximum delivery capacity of said station. ..." (80 F. Supp. at 28.)

The District Court dismissed the complaint upon the motion of Panhandle and the Federal Power Commission, among others, on the grounds that the delivery of gas to Consolidated by Panhandle, as it was affected by the capacity of the Edgerton station and additions thereto, was within the primary and exclusive jurisdiction of the Commission. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, E.D. Mich., Sept. 17, 1948, 80 F. Supp. 27. This was barely two months subsequent to the entry of the Commission's order and Opinion No. 166 and less than a month

after Opinion No. 166A. Interestingly enough, the Court of Appeals for the *Sixth Circuit* affirmed this decision upon the ground that the exercise of jurisdiction by the District Court would invade the province of the Federal Power Commission (173 F. 2d 784).

Consolidated also petitioned the Court of Appeals for the District of Columbia Circuit for review of Opinions Nos. 166 and 166A (R. 1055a). This petition was abandoned (R. 1057a) by stipulation between Consolidated, the Federal Power Commission, and Panhandle.

In its original answer to Panhandle's complaint, Consolidated denied that its contractual right to 125,000 Mcf had been superseded by the above-mentioned opinions and order of the Federal Power Commission (R. 240a, 336a). It claimed, via a counterclaim, that Panhandle had failed to deliver 125,000 Mcf per day and was, accordingly, liable under the contract for the deficiency (R. 131a, 133a). Nearly two years later, Consolidated amended its answer to set up the additional defense that Panhandle had failed to deliver to it the quantities of gas contemplated by the order of the Commission in 1948.[21] And two years after this amendment it set up another defense that Panhandle had breached its contract obligations in failing to provide adequate facilities at its

[21] It is Panhandle's position that Consolidated was estopped to assert a violation of the Commission's order since, in its letters of set-off, it made no such claim. Rather, in those letters it claimed that the contract continued to govern regardless of the Commission's order. Under the decisions of this Court and others, it could not alter the ground of its set-off after litigation began. *Ohio & Mississippi Ry. Co.* v. *McCarthy*, 96 U.S. 258; *Lerman* v. *Fruit Processors*, 191 F.2d 349.

Edgerton station, and in failing to use such facilities at their capacity during the effective period of the order discussed above (R. 400a-401a, 406a-407a, 473a-474a).

The District Court granted judgment to Panhandle for the $600,000 it claimed and held that the order of the Commission of July 17, 1948, effectively modified the contractual obligation. This disposed of Consolidated's claim to recover by way of set-off or otherwise for manufacturing the full deficiency between the amount delivered during the emergency period and the contractual amount. As to the claim that Panhandle had breached its obligation in failing to provide adequate facilities,[22] and the claim that Panhandle had failed to deliver to Consolidated the quantities of gas contemplated by the Commission's order of July 17, 1948, the District Court held that any such defense was within the primary jurisdiction of the Commission.[23]

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[22] The court had already granted summary judgment on the counterclaim (R. 319a).

[23] The District Court said (R. 1328a):

> ". . . Both matters involved intricate problems of service as between different users and different geographical sections and must be decided with the perspective and expertise which only the Commission could bring to such deliberations.
>
> "The authority of the Commission over these matters, as set out in that opinion, cannot now be by-passed under the guise of a proceeding for damages. To hold Panhandle liable in damages for the reasons advanced by Consolidated is but another way of regulating activities which Congress has entrusted to the Commission. Any private remedies in these premises which Consolidated might otherwise have had under the Agreement of 1935 must give precedence to the regula-

The Court of Appeals did a curious thing. It held that the order of July 17, 1948 was effective to modify the contractual obligation to deliver 125,000 Mcf a day to Consolidated. The court held, however, that Opinion No. 166A was merely an "interpretation" of Opinion No. 166 and that therefore no order effectively superseded the contractual right of Consolidated to claim damages caused by wrongful deficiencies in delivery.[24] The court affirmed the District Court in so far as it refused to entertain Consolidated's claim that the shortage of gas was caused by Panhandle's neglect or failure to provide adequate facilities at Edgerton station. However, it reversed the District Court's holding that the question of violation of the Commission's order was within the primary jurisdiction of the Commission.

The gist of the court's decision was that to the extent that Panhandle failed to deliver through its Edgerton compressor station the full capacity of that station, Consolidated had a cause of action for damages measured by the cost of manufacturing such gas and accordingly that its claimed set-off and counter-

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tory powers of the Commission and Consolidated must secure Commission sanction for damage claims as well as claims for specific enforcement before it has standing to request the application of the coercive power of this Court. Otherwise, Panhandle may be penalized for alleged failure to perform its contract when such performance would have been contrary to the public interest and forbidden by the Commission."

[24] Opinion No. 166A had stated that, " . . . the invoking by Michigan Consolidated of [the set-off and damage provisions of the contract] is precluded" (R. 157a).

claim were valid to that extent.[25] The court reached this conclusion by relying on the statement in Opinion No. 166 that the Commission expected Panhandle to curtail interruptible deliveries in order to deliver through Edgerton the largest volumes of gas possible, and held (App. 18a):

> "We construe the order as granting to Consolidated and Michigan Gas Storage priorities over interruptible customers west of Edgerton in the volume of gas to be delivered by Panhandle at Edgerton up to the capacity of that station. It follows that, if Panhandle failed to deliver to Consolidated and Gas Storage in the percentages established and up to the capacity of Edgerton Station such volumes of natural gas as were available after making deliveries to Panhandle's other customers east of Edgerton Station, Panhandle is liable ... ."

ARGUMENT, SECOND CASE

Question 1. The court below upheld Consolidated's claimed set-off and additional counterclaim for alleged deficient deliveries of gas during the emergency period involved, on the basis of two assumptions. First, it assumed that the Commission had *ordered* Panhandle, at the risk of incurring substantial damages, to put through Edgerton station the full physical capacity of that station. Secondly, it assumed that Panhandle was *required* to curtail deliveries to interruptible customers west of the station if that was necessary to insure operation of Edgerton at full ca-

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[25] The court also held that Panhandle was liable for the cost of manufacturing gas long after the emergency period. While this holding was erroneous, it is not separately argued herein. Panhandle reserves its position in this matter because, if it prevails, the decision below on this question will also fall.

pacity.[26] It concluded, therefore, that if Panhandle failed in either respect, liability attached under the contract.

At the outset, it must be pointed out that the court's interpretation of the Commission's order cannot be logically supported. The order accompanying Opinion No. 166 nowhere requires Panhandle to curtail interruptible sales west of Edgerton. Rather, the Commission expressly declined to order Panhandle to do this. In the Opinion, the Commission found that it would be unfair to curtail interruptible sales elsewhere so as to assure uninterrupted deliveries in Michigan, and stated (R. 215a):

> " . . . it is doubtful that we could conclude that interruptible industrial sales made directly or indirectly along the Panhandle System west of its Edgerton compressor station in the summer months . . . should be curtailed. . . ."

In reaching its conclusion, the court below relied upon the portion of Opinion No. 166, which, after noting that the dominant factor with respect to the supply of gas east of Edgerton was the physical capacity of the station, stated (R. 216a):

> " . . . we believe that Panhandle will exert every reasonable effort to deliver through that station the largest volumes of gas possible; and we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries . . . ."[27]

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[26] It also assumed that Panhandle could invariably interrupt deliveries west of Edgerton. See, however, n. 27 and n. 33, *infra*.

[27] The record actually shows that on September 17, 1948, Panhandle attempted curtailment of some interruptible customers

The action of the court below in treating these expectations, these precatory statements, as an order, is clearly erroneous and in conflict with numerous decisions of this Court. It has long been held that such statements cannot be construed as orders.

In *United States* v. *Atlanta B. & C. R.R.*, 282 U.S. 522, 524, 527, the Interstate Commerce Commission had found the amount to be included in the balance sheet of the railroad representing investment in road and equipment and had stated:

> "The company will be *expected* to adjust its accounts in accordance with this finding. . . ." (Emphasis supplied.)[28]

This Court held that the finding was not an order under the Urgent Deficiencies Act and characterized it "as an opinion as distinguished from a mandate." See also *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618.

In *Shannahan* v. *United States*, 303 U.S. 596, 599, this Court denied review of a determination of a carrier's status under the Railway Labor Act because the

> ". . . decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative.' . . . But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. 'It was merely preparation for possible action in

west of Edgerton by as much as 50% (R. 276a) but that this was resisted by the customers. By the time the Commission obtained an injunction against Panhandle's customers, however, the emergency period had virtually run its course (R. 274a-284a).

[28] The parity of the language used by the FPC in this case and the ICC in the *Atlanta* case is striking.

some proceeding which may be instituted in the future.' "

In the instant case, the court below made into an order the precatory statements of the Commission quoted above, and thereby at this late date bound Panhandle to do something which the Commission itself had never ordered. Because this decision is in conflict with the decisions cited above, certiorari should be granted.[29]

Question 2. The claim that Panhandle was not, during the period involved, operating its compressor station at the maximum delivery capacity had already been held by a District Court and by the Sixth Circuit Court of Appeals to be a matter which could not be litigated prior to Commission action. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 80 F. Supp. 27, *affirmed*, 173 F. 2d 784. The instant litigation involved the very same controversy except that in the prior case the suit was for an injunction. In the District Court opinion, 80 F. Supp. at 30-31, Opinion No. 166 was referred to and the court said:

"... The Commission expressly refused to order the defendant to act in accordance with the expectations it there expressed. Plaintiff may not substitute a new lawsuit in this court for the exclusive statutory method of review in Sec. 19(b)."

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[29] The Sixth Circuit Court of Appeals had already held in effect as to this same controversy that the statements of the Commission now relied upon were not an order. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 790, quoted *infra*. Another *res judicata* aspect of the Sixth Circuit's earlier decision is discussed below.

The Court of Appeals, 173 F. 2d at 790, stated:

> "Much of the information as to the technical and practical phases of the Panhandle system necessary for the determination of issues here involved, is already in the Commission's possession. The problems to be met call for judgment within its peculiar and expert experience. ... In its opinion the Commission said it expected Panhandle to curtail gas deliveries to interruptible customers if necessary to do so and to the extent required to operate the Edgerton Station at capacity. *It is not an unusual practice either by court or Commission, to grant opportunity in advance of mandate, with the exercise of power reserved for failure to comply. Consolidated has not invoked the authority of the Commission to the full extent of its regulatory powers. Until it has done so there is nothing for a court appropriately to decide.* It is not for us to suggest the mechanism of invocation. It will be time enough to appraise the method when, either upon direct appeal under § 19, 15 U.S.C.A. § 717r or in review of an original proceeding, the issues are presented after exhausting administrative remedies." (Emphasis supplied.)

As is apparent, the decision in this case precludes Consolidated's claim in the instant litigation; and, the court below, although it cited (App. 6a) its prior decision, failed to accord it any effect. The decision not only of the District Court but of the Sixth Circuit Court of Appeals itself had required Consolidated, if it was to state a claim based on the capacity of the Edgerton Compressor Station, to apply to the Commission to establish facts necessary to its claim. That was a sound decision, but, even if the decision were erroneous, it is *res judicata* as between Panhandle and Consolidated now. The complaint for injunction was

dismissed because it was held that the court had no jurisdiction to entertain Consolidated's claim in the absence of prior resort to the Commission. Panhandle and Consolidated were parties to that case. Consolidated's claim was decided adversely to it on the ground that the Court lacked jurisdiction. Since the same issue is presented in the instant litigation, and since Consolidated has neither resorted to the Commission nor obtained direct review, it cannot now relitigate its prior claim.

In this regard the decision of the court below conflicts with applicable decisions of this Court. *Baldwin* v. *Iowa State Traveling Men's Ass'n,* 283 U.S. 522; *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371; *Stoll* v. *Gottlieb,* 305 U.S. 165; *Partmar Corp.* v. *Paramount Theatres Corp.,* 347 U.S. 89.

Question 3. Laying aside the important questions as to the interpretation of the order of the Commission by the court below and its failure to give conclusive effect to the former decision regarding this same claim of Consolidated's, there is still a very basic aspect of the decision of the court below which warrants review by this Court. That is, the question of primary jurisdiction. The court below held that Panhandle would be liable to Consolidated in damages for the difference, if any, between the full capacity of Edgerton station and what was actually delivered (App. 18a). The Commission, in Opinion No. 166 recognized that the controlling fact as to the delivery of gas to customers east of Edgerton was the capacity of the station at Edgerton.

The Commission undertook to modify the contract between Consolidated and Panhandle to alleviate a

critical shortage of gas. It did this using 270,000 Mcf per day as the capacity of Edgerton station, the gateway through which all the gas going east had to pass. While the Commission might have thought that the capacity was in excess of 270,000 Mcf, it did not determine what the actual capacity was.[30]

In this situation, if Consolidated thought that Edgerton's capacity was not being fully utilized, or, if it was dissatisfied with the Commission's use of the 270,000 figure, complaint could have been made to the Commission, or, review of the order could have been obtained. Consolidated did neither.[31]

The decision of the Sixth Circuit Court of Appeals in 1949, 173 F. 2d 784, correctly held that Consolidated

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[30] It may be expected that whatever the capacity was, it was not too far in excess of 270,000 Mcf, for the Commission used that figure as the basis for its determination of the rights and obligations of all the parties. Certainly the capacity was insufficient to deliver the full contractual amount to Consolidated during the period involved.

[31] Panhandle contends that the Commission used 270,000 Mcf as the capacity of Edgerton, and gave Panhandle a discretion regarding curtailment of interruptibles west of Edgerton; and that Panhandle actually delivered an amount in excess of 270,000 Mcf and complied with the order in the manner intended by the Commission. Under Sections 14 and 20 of the Act, 15 U.S.C. §§ 717m and 717s, the Commission had power to compel, at its own or Consolidated's instance, compliance with the order if a violation occurred. Since Consolidated did not invoke the administrative remedy and since it did not complete an appeal under Section 19(b) of the Act, 15 U.S.C. § 717r(b), it cannot now complain that Panhandle did not comply with the order. Consolidated's set-off and counterclaim constitute a collateral attack upon the order which should not have been entertained.

could not advance the claim that Panhandle was violating the order of the Commission without prior reference to the Commission. Since the Commission refused to, and indeed never has sought to determine the capacity of the Edgerton station (the controlling fact upon which Consolidated's claim of a violation of the Commission's order rests), the court below should not have entertained Consolidated's claim. Assuming that a court would ultimately have jurisdiction to entertain such a claim, it could not do so in the absence of the Commission determination mentioned above.

It is Panhandle's position that there can be no claim by Consolidated for any deficiencies in delivery since it failed to exhaust the Commission remedies available to it to obtain the vital capacity determination. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, *supra.* This decision was clearly in accord with many decisions of this Court.

It is necessary to consider what is involved in a determination of the capacity of the compressor station.[32] A gas pipe line may be likened to a vessel containing a liquid from which many interrelated spouts protrude. As a matter of physics, taking liquid from any one of the spouts will lower the fluid content throughout the system. A determination of capacity of a compressor station cannot be made in a vacuum, for it involves multitudinous considerations not only of complex transportation problems but of technical matters as well. Obviously, if all the gas which was introduced into the Panhandle pipeline was taken by

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[32] The court below held (App. 17a) that the question whether Panhandle had complied with the Commission's order "... presents the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge."

customers west of Edgerton, there would be no gas to utilize the capacity of the station. On the other hand, even though no gas was taken prior to the Edgerton station, there would be a limit to the amount of gas which could be compressed and put through that station. The situation is not so simple in actual practice. There are demands on every part of the pipe line system; and, what these demands will be cannot be determined in advance of the gas being taken from the system. There are many compressor stations. The capacity of any one compressor station will vary from hour to hour, from day to day, depending on the changes in the many factors which determine capacity. Some of the considerations are the number of compressor engines in the station, and their horsepower, whether all are in use or whether necessary maintenance work puts some out of commission. A very significant factor is the pressure of the gas immediately before it enters a given compressor station (suction pressure) and this, of course, will be largely dependent upon how all the other compressor stations prior to the one in question are operating, and upon what are the demands on the rest of the pipe line system.[33] Any unexpected demand or lack of demand for gas on

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[33] This factor is of tremendous significance in this case in view of the claim and the decision below that Panhandle was required to curtail interruptible deliveries west of Edgerton so that the compressor station at Edgerton would operate at maximum suction pressure. It should be pointed out here, as we have elsewhere, that Panhandle actually did undertake to curtail such deliveries and it became necessary before the curtailment could be accomplished to obtain an injunction against the customers who were resisting the curtailment order. Obtaining this injunction took thirty days and in the circumstances of this case the lapse of that time was a factor to be considered in determining the capacity of Edgerton Station (R. 274a-284a).

the upstream side of a compressor station will cause wide fluctuation in capacity. The pressure of gas immediately after compression (discharge pressure) is another important consideration, and it will depend, in addition to the number and horsepower of the engines working, upon the quality and strength of the piping, the temperature of the gas, the maximum safe working pressure limit of the engines, and the managerial decision as to whether to overload existing engines and other facilities.

The question here is whether or not a court should determine a fact so complicated and so clearly within the technical competence of the Federal Power Commission as is the capacity of Edgerton compressor station at any given period. The District Court in the instant case found that to hold Panhandle liable in damages for failure to deliver what the court might find to be the capacity of Edgerton would be "but another way of regulating activities which Congress has entrusted to the Commission" (R. 1328a). The court required Consolidated to go first to the Commission. "Otherwise," it said, "Panhandle may be penalized for alleged failure to perform its contract when such performance would have been contrary to the public interest and forbidden by the Commission." *Ibid.*

It is submitted, that to allow the court below to open up now the question of the capacity of Edgerton station would permit the absolute frustration of the Commission in any attempt it made to meet emergency situations and to allocate gas among *all* of the customers of the pipe line. No pipe line could willingly cooperate with a Commission order like that of July 17, 1948, if it would, as Panhandle is here, be faced with litigation for years to come arising out of technical matters

within the competence of the Commission, like the capacity of its compressor stations. The doors of the Commission were open to Consolidated if it felt that Panhandle was refusing or failing to comply with the Commission's order and there, we submit, was the forum.

Premature judicial intervention may easily defeat the basic legislative intent that full use should be made of an agency's specialized understanding within a particular field. This is the main purpose behind the concept of primary jurisdiction. Emphasizing, as we must, the fact that the capacity of the Edgerton station is the crucial determinant in so far as Consolidated's claim is concerned, it seems clear that the court should have refused to entertain the claim because of Consolidated's failure to pursue the administrative remedy. *Illinois Commerce Commission* v. *Thomson,* 318 U.S. 675.

Where, as in the case of the capacity of Edgerton station, the factual question involved is intricate and technical, an agency specifically designated to deal with it should do so in the first instance. *Armour & Co.* v. *Alton RR.,* 312 U.S. 195, seems almost squarely in point. The issue before the Court was whether under the facts the railroad was required to deliver its shipments of livestock at such a location and in such a manner that it need pay no yardage charge. Armour & Company's complaint had been dismissed by the District Court on the ground that the issues presented administrative problems necessitating primary resort to the Interstate Commerce Commission. The complexities of the factual questions involved, particularly questions relating to "complex transportation problems" required, this Court held, the application of

the primary jurisdiction doctrine. As was pointed out above, complex transportation problems and technical questions are involved in determining for any time or period the capacity of Edgerton station; and, it is submitted that the claim of Consolidated should not have been entertained by the court below.

The capacity of Edgerton station is certainly not a question of law within the peculiar competence of the courts. Even if the abstract physical capacity of Edgerton could be determined by a court based upon evidence of skilled technicians, such a determination would be of no value, for enforcing the determination might involve taking gas from someone somewhere else on Panhandle's system, an action which the Commission may well have determined should not be done. A determination by the Federal Power Commission here was required because the inquiry was essentially one of complex fact and discretion in technical transportation matters. As Mr. Justice Brandeis said in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291:

> "... that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

When the Commission was discussing what it believed Panhandle would deliver through Edgerton station (assuming that this amounted to an order) it did not say that Panhandle would be required to deliver the "capacity" of that station. Rather, it said, "we believe that Panhandle will exert every reasonable effort to deliver through that station the largest

volumes of gas possible" (R. 216a). This is far different from the technical physical capacity of the station. The quoted language means that taking into consideration all the other demands upon Panhandle's system, Panhandle should deliver as large a volume of gas as it was able to. Construing the order as requiring interruption of some deliveries west of the station, as did the court below, does not solve the problem, either. For, as the District Court said, "intricate problems of service as between different users and different geographical sections" must be resolved before the quantity of gas that might have been delivered through Edgerton could be determined. In short, only the capacity of Edgerton for the purposes of the Commission's order is relevant.

This Court recently had before it the case of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission,* 341 U.S. 246. There the problem was whether it was "open to the courts to determine what the reasonable rates during the past should have been." As the Court there said, paraphrasing for the purposes here, it is not the technical physical capacity of Edgerton station which Consolidated may claim, but that capacity as embodied in an order in which the Commission determines the rights of buyer and seller. The court might think one capacity reasonable, but in the context here the Commission had to determine the capacity and independently of Commission action no right was created which the courts may enforce (341 U.S. at 251).

It is submitted that the decision of the court below was in flagrant contradiction of the decisions of this Court holding uniformly that matters such as those in-

volved in this case are within the primary jurisdiction of the regulatory agency.

Whether this is a case where Consolidated's claim ought to be dismissed entirely or held pending reference to the Commission need not now be considered. See, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission, supra.* In light of the other considerations heretofore advanced, it is sufficient at the moment to show that the court below was in error in presuming to decide the claim advanced by Consolidated involving, as it did, complex technical questions which a court should not try.[34]

Apart from the legal necessity of invoking the primary jurisdiction of the Commission, in the light of the history of this litigation, it appears that the court below reached a rather lopsided view of the relative positions of Panhandle and Consolidated. It cannot escape the attention of this Court that the Commission itself had said on August 25, 1948, in Opinion No. 166A, that Consolidated was precluded, under its order, from withholding from or charging Panhandle for the cost of manufacturing deficiencies in deliveries. Moreover, and still during the emergency

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[34] Throughout the history of this long and complicated litigation, the District Court adhered to the view that Consolidated's claim was within the primary jurisdiction of the Commission. Primarily on this basis, it granted in June, 1949, Panhandle's motion for summary judgment (filed in November, 1948) as to Consolidated's counterclaim (R. 319a). Some years later, in April, 1952, Consolidated petitioned for reference of the claim to the Federal Power Commission. Panhandle then opposed the granting of the petition on a number of legal and equitable grounds, including the delay in filing (R. 433a *et seq.*) The decision of the Court of Appeals has injected a new element in the case, one which could not have been met below.

period, the District Court for the Eastern District of Michigan (80 F. Supp. 27) had held that the question whether Panhandle was violating the order of the Commission was a matter within the primary and exclusive jurisdiction of the Commission.

In the face of the Commission's assumption of jurisdiction over the problem in its Opinions Nos. 166 and 166A, and despite a specific mandate, not only by the District Court but also by the Sixth Circuit Court of Appeals itself (173 Fed. 2d 784), Consolidated has never obtained the necessary Commission determination. Yet, the Court of Appeals for the Sixth Circuit now says that the court has jurisdiction without reference to the Commission. It simply brushed aside the Commission's action as mere "interpretation" and ignored its own prior decision.

It seems only fair that Panhandle should not now have to face a damage claim for alleged violation of an "order" which the Sixth Circuit Court had already held created no right in favor of Consolidated because it lacked an essential determination by the Commission, and which the Commission itself had held precluded Consolidated's set-off and counterclaim.

CONCLUSION

The decision of the court below, as has been shown, presents a number of very important problems generated by the impact of the Natural Gas Act upon the relations of a natural-gas company and its customer, a distributing utility. The importance of the problems cannot be gainsaid, for prior to this case there have been few suits between natural-gas companies and their customers which involve the application of orders of the Federal Power Commission and the powers of

the Commission under the Natural Gas Act in relation to the contractual obligations of a gas company and its customers.

First Case. It is respectfully submitted that the court below should not have permitted a collateral attack on the Commission's order of November 2, 1945. Commission action, like court action, must be finalized at some point. Moreover, the ruling of the court below raises important questions regarding the sufficiency of the findings of the Commission in the abovementioned order, particularly in the light of what was happening. If the Commission is to be required as suggested by the court below to make findings abrogating every provision of myriads of contracts between a natural-gas company and its customers when it is implementing a prior order to decrease the rate level of the natural-gas company, then the Commission will be enmeshed in a hopeless jumble of contracts, contractual provisions, and amendments thereto, and will be required to make findings in the language of Section 5(a) not only as to provisions of existing contracts clearly affected by its order, but also collateral provisions as to which its order may be only remotely connected.

Second Case. The decision of the court below presents a very practical problem of great importance regarding the claim by Michigan Consolidated that Panhandle violated a Commission order which required Panhandle to deliver less gas than was called for by the contract between Panhandle and Consolidated. It is submitted that before a natural-gas company should be placed in this situation, the requirements imposed upon it by the Commission should at least be incorporated in an order and in any event should be clearly

delineated by the Commission. Morever, there should be an end to the litigation of claims such as that presented by Consolidated. As shown in the argument, this very same claim was litigated once before and has now been resurrected in defense of Panhandle's suit for money concededly due. The argument advanced herein that the claim should have received the expert attention of the Federal Power Commission, it is submitted, is conclusive.

WHEREFORE, this petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its judgment.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

(Filed Aug. 1, 1955, Carl W. Reuss, Clerk)

Nos. 12200, 12201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Consolidated Gas Company, No. 12200, Appellant

v.

Panhandle Eastern Pipe Line Company, Appellee.

Panhandle Eastern Pipe Line Company, No. 12201, Appellant,

v.

Michigan Consolidated Gas Company, Appellee.

Appeals from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Dated August 1, 1955.

Before ALLEN, MILLER and STEWART, Circuit Judges.

ALLEN, Circuit Judge. These consolidated appeals attack a judgment of the District Court in an action filed by plaintiff-appellant Panhandle Eastern Pipe Company, hereinafter called "Panhandle," against Michigan Consolidated Gas Company, hereinafter called "Consolidated." Panhandle is a producer of natural gas which operates a

pipe line system from Texas to Michigan, and Consolidated is a utility distributing natural gas in Detroit and the Detroit metropolitan area, and Western Michigan. In appeal 12201 Panhandle attacks that part of the judgment denying Panhandle recovery on Causes of Action or Counts I, II, III, V, and VII of its complaint and supplemental complaints and denying interest prior to the date of the entry of judgment on [2] recovery granted to Panhandle in the amount claimed in Counts IV and VI of the complaint. In appeal 12200 Consolidated appeals from that part of the judgment which grants Panhandle recovery of $601,354.39 against Consolidated, together with interest from the date of entry of judgment. Consolidated also appeals from the judgment that Consolidated take nothing by its counterclaim.

In 1935 Panhandle and Consolidated entered into a contract which, with later amendments, provided that Consolidated should buy all of its natural gas from Panhandle, but not in excess of 125,000,000 cubic feet per day. After the enactment of the Natural Gas Act of June 21, 1938, 15 U. S. C., Section 717, this contract and the amendments thereto were filed and became effective as supplements to Rate Schedule FPC No. 12. On September 23, 1942, the Federal Power Commission, hereinafter called the "Commission," after various hearings, entered an order requiring Panhandle and certain subsidiaries to reduce their rates and charges and file new schedules embodying this reduction. On April 2, 1945, the United States Supreme Court affirmed this order. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635. On October 22, 1945, Panhandle tendered for filing supplements to its previous rate schedules which were approved by the Commission November 2, 1945, in an order making such rates effective on and after November 1, 1942. Among the rates approved was Supplement No. 5 to Rate Schedule FPC No. 12 containing RATE SCHEDULE Gd-1 which governs "Deliveries to Utilities-Firm, Resale." This rate

schedule, which is the basis of the principal question presented in appeal 12201, is printed in the margin.[1]

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[1] RATE SCHEDULE Gd-1.

Deliveries to Utilities-Firm, Resale

APPLICABLE

(a) This rate shall apply to all natural gas purchased on a firm basis by the Utility for resale to domestic and other customers, except such natural gas as the Utility shall purchase, under any other rate schedule of the Company available to the Utility.

(b) Subsequent to October 1, 1945, the Utility, at its option, may purchase gas under this rate schedule for resale to any individual customer whose present, or estimated, annual use of gas is less than one million two hundred thousand (1,200,000) therms and whose gas requirements were purchased by the Utility from the Company on an interruptible basis prior to October 1, 1945.

(c) This rate schedule shall not apply to gas purchased by the Utility from the Company for resale to any individual customer whose present, or estimated, annual use of gas exceeds one million two hundred thousand (1,200,000) therms, unless such gas requirements were purchased by the Utility from the Company on a firm basis prior to October 1, 1945.

RATE

(a) For all gas delivered hereunder, each month, in Indiana, Ohio and Michigan:

for that number of therms herein defined as "base load" one and eighty-five hundredths (1.85) cents per therm.
for that number of therms in excess of "base load" two and six-tenths (2.6) cents per therm.
(b) Determination of "base load" for each billing month.
(1) The "daily base load" applicable to each period of twelve (12) billing months shall be the average number of therms delivered per day during the four (4) consecutive months of June to September, both inclusive, immediately preceding such period. Provided, however, if the Company, due to its inability or on its own initiative, fails to make delivery of normal requirements or agreed amounts, such curtailed deliveries and the days on which made shall be excluded in the determination of "daily base load."

(2) The daily base load shall be determined once each year as soon after October 1st as practicable, and the daily

[3] In 1947 Panhandle complained to the Commission that Consolidated, which at the time controlled the physical equipment for delivery in Detroit, was taking gas in violation of the 1,200,000 therm limitation of RATE SCHEDULE Gd-1 APPLICABLE (c). Panhandle requested that it be permitted, in accordance with the contract of August 31, 1935, to examine Consolidated's books and records in respect of sales to individual customers covered by the 1,200,000 therm limitation Gd-1 APPLICABLE (c) but its requests were refused. On August 8, 1947, the Commission in a letter charged that Consolidated was receiving gas from Panhandle contrary to the provisions of Gd-1 APPLICABLE (c). Consolidated replied that with reference to the resale of gas received from Panhandle it was not subject to regulation by the Commission. On August 16, 1947, the Commission embodied in specific findings its charge that Consolidated was violating Gd-1 APPLICABLE (c). On August 19, 1947, the Commission filed an action in the Federal Court for the Eastern District of Michigan against Panhandle and Consolidated, praying for temporary and permanent injunction against the resale practices in question. Within a week this suit was dismissed without prejudice. On September 8, 1947, Consolidated filed an application for rehearing on the order of November 2, 1945, and for vacation of the Commission's finding of August 16, 1947. As to the order of November 2, 1945, the application was held to be untimely filed and the Commission dismissed the application. An ap- [4] peal taken from this order was dismissed by the Court of Appeals for the District of Columbia, *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 167 Fed. (2d) 264. In an order entered December 12, 1946, the Commission, as

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base load so determined shall be effective for the immediately succeeding twelve (12) months' period, beginning with the October billing month.

(3) The "base load" shall be the daily base load multiplied by the number of days in the billing month or shall be the total number of therms delivered, whichever is less.

a result of hearings and of voluntary agreement reached by Panhandle and certain distributing utilities, established emergency curtailment of service under rules and regulations which were continued in force by subsequent orders until November 25, 1947, and later extended until June 1, 1948. On July 17, 1948, the Commission filed its Opinion No. 166 and an order of the same date, which provided for distribution of definite amounts of gas to The Ohio Fuel Gas Company until April 30, 1949, and also that "of such volumes of natural gas as may be available after making deliveries to all of its other customers east of its Edgerton [Indiana] Compressor Station" Panhandle should make deliveries to Consolidated and to Michigan Gas Storage in certain percentages which are printed in the margin.[2] The order also provided that Panhandle install physical means of controlling the delivery of natural gas to Consolidated at Detroit and deliver such gas to Consolidated at Detroit without restriction as to locality of resale.

August 18, 1948, Consolidated filed an action for specific performance of its contract of August 31, 1935, as amended, praying that the court require installation by Panhandle of additional facilities at the Edgerton Compressor Station and compel Panhandle to operate so as to insure as near as reasonably possible a continuous supply of gas in the volume of 125,000,000 cubic feet per day. This case was dismissed by the District Court upon the ground that the controversy was exclusively within the jurisdiction of

[2] Panhandle shall deliver to Michigan Consolidated 52% and to Michigan Gas Storage 48% of such available volumes of natural gas until such date as the total volumes delivered to both such companies from and after May 15, 1948, shall have reached a proportion of 55.6% to Michigan Consolidated and 44.4% to Michigan Gas Storage; and, from such date until October 31, 1948, such volumes of gas as may be available for delivery to these two companies shall be delivered by Panhandle on a daily basis in the proportion of 55.6% to Michigan Consolidated at Detroit and 44.4% to Michigan Gas Storage. Any variation in the daily delivery to either customer from the aforesaid percentages shall be adjusted within seven days; or; . . .

the Commission. This court affirmed the judgment in *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 Fed. (2d) 784. In *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 177 Fed. (2d) 942, an action for declaratory judgment involving similar issues, this court [5] reversed a judgment of the District Court granting a temporary injunction to prevent curtailment of gas delivery from the pipe line to the distributor.

On July 30, 1948, Panhandle filed the complaint herein, charging in Counts I, II, II and V that by reason of alleged violations of the 1,200,000 therm limitation in RATE SCHEDULE Gd-1 APPLICABLE (c) Consolidated had not paid the full amount owing for gas delivered during the billing periods, October 1, 1946, through September 30, 1947, and October 1, 1947, through September 30, 1948. It claimed that the compensation due Panhandle for the periods involved should be computed by excluding from the "base load" amounts of gas taken in excess of the 1,200,000 therm limitation and that under RATE SCHEDULE Gd-1 RATE (a) the 2.6 rate instead of the 1.85 rate should be charged for the number of therms delivered in excess of the "base load." Consolidated had paid at the 1.85 rate for these amounts of gas delivered. Counts I, II, III, and V prayed for judgment for such amounts as computed at the 2.6 rate, including interest at 6% per annum from the date of the bills rendered.

In Counts IV and VI Panhandle set up that $601,354.39 plus interest owing to Panhandle for gas delivered to Consolidated had been deducted and withheld by Consolidated as claimed setoff for gas manufactured by Consolidated in order to fill alleged deficiencies in delivery during the period from July 23, 1948, through October, 1948. Consolidated admitted that it had not paid for gas delivered by Panhandle, but claimed that under the amended contract of August 31, 1935, and also under the Commission's order of July 17, 1948, Panhandle was liable to reimburse it for the cost of manufacturing gas during the period of de-

ficiency deliveries. In Count VII of the complaint Panhandle claimed that Consolidated had unlawfully inflated the "base load" by excluding from its computation of the daily "base load" certain days in July, August, and September of 1948, when plaintiff delivered less than 125,000,000 cubic feet per day. These deficiencies were in conformity with the Commission's order of July 17, 1948. Panhandle asserted that by applying the correct "base load" computation a bill of $157,541.16 with interest was due to Panhandle.

Consolidated filed a counterclaim, claiming reimbursement for the cost of manufacturing such gas for certain days in December of 1946, in January and February of 1947, in anuary of 1948, in August, September, [6] and October of 1948. The total amount claimed in the second amendment to the counterclaim was $1,500,000. The District Court gave judgment for Consolidated on Counts I, II, III, and V, for Panhandle on Counts IV and VI, refused the interest prayed for by Panhandle from the date of bills rendered prior to the entry of judgment, rendered judgment for Consolidated on Count VII and rendered judgment against Consolidated on its counterclaim.

Consolidated contends that under the Natural Gas Act, 15 U. S. C., Section 717 (b), the Commission had no power to adopt or approve Gd-1 APPLICABLE (c) because it prohibits the resale of gas to new large industrial customers of the local utility. Section Gd-1 APPLICABLE (c) imposes no prohibition on sale to domestic consumers and no limitation on the use of gas resold to domestic consumers. What Gd-1 APPLICABLE (c) provides is that certain rates applicable between Panhandle and Consolidated shall not apply in the circumstances defined therein. The District Court decided correctly that, while Gd-1 APPLICABLE (c) may indirectly affect local distribution of gas by Consolidated, its primary purpose is the application of the provision to an interstate transaction, the purchase of gas by Consolidated on a firm basis from Panhandle, to

interstate rather than to local sales. Cf. *Ambassador, Inc.*, v. *United States*, 325 U. S. 317. The contention on this point must be overruled.

The judgment as to Counts I, II, III, and V must be affirmed for the reason as held by the District Court, that Gd-1 APPLICABLE (c) has no legal effect. The Commission did not take the required statutory steps to put the terms and conditions of service established in Gd-1 APPLICABLE (c) into effect so as to supersede the contractual provisions of August 31, 1935, as amended, binding on both Panhandle and Consolidated. It is conceded by the parties and the Commission decided that under the contract as amended Consolidated has a right to receive from Panhandle, on a firm basis, up to 125,000,000 cubic feet of gas per day at specified rates. But Panhandle claims that Gd-1 APPLICABLE (c), if effective limits this right. While under 15 U. S. C., Section 717d (a) the Commission had authority to establish limitations modifying the contract between Panhandle and Consolidated as an incident to its power to regulate rates (*Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co., supra*), Section 717d (a) requires that such action be based upon an express [7] finding that the contractual provision in question is unjust, unreasonable, unduly discriminatory, or preferential. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575. In its order of September 23, 1942, the Commission, having found under Section 717d (a) tha rates and charges theretofore made, demanded, and received by Panhandle were unjust, unreasonable, and excessive, ordered Panhandle to file new schedules of rates and charges to reflect the reduction ordered. Panhandle framed the revised schedules and after full hearing the Commission approved and made these rates effective by its order of November 2, 1945. No findings were included in the order of September 23, 1942, nor in the order of November 2, 1945, to the effect that other practices or provisions of the contract of August 31, 1935, than the rate pro-

visions were unjust, unreasonable, unduly discriminatory, or preferential. Panhandle, however, points out that the revised schedules put into effect November 2, 1945, were filed, not by the Commission but by Panhandle, under Section 717c (d). When a utility files new or amended rates under this section, Panhandle contends the findings essential under Section 717d (a) are not required.

Assuming but not deciding that findings are not necessary under Section 717c (d), (Cf. Administrative Procedure Act, Title 5, § 1007[b]), we think Panhandle's contention cannot be sustained. The fact that the Commission, instead of directly establishing new rates, ordered Panhandle to frame new rates in accordance with its order of September 23, 1942, is not decisive. When the Commission ordered Panhandle to submit new rates, Section 717d (a) necessarily applied. The rates were filed on behalf of the Commission and were adopted by the Commission as its own in the order of November 2, 1945. This in legal effect was the equivalent of rates initiated by the Commission.

The advantage, in a proceeding covering transactions in eight states, of being able to order the utility to frame and submit new rates, is obvious. But to hold, as contended here, that the rates as a matter of law are Panhandle's subject to the provisions of 717c (d) and not the Commission's controlled by Section 717d (a) (assuming that findings are not necessary as to rate schedules filed by a utility under Section 717c [d]) would enable the Commission by the simple device of ordering a utility to file rate schedules to dispense with the findings essential under the statute. The Commission is authorized not only to modify contractual obliga- [8] tions, but also to impose reasonable conditions as to service. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra,* 647; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co., supra,* 789. However, express findings must be entered, both with reference to change of rates and to new provisions for conditions of service. *Colorado Interstate Gas Co.* v. *Federal*

Power Commission, 142 Fed. (2d) 943, 954 (C. A. 10); *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 295 U. S. 193; *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U. S. 626, 634. The very flexibility of operation which is afforded in administrative proceedings makes all the more essential a requirement of express findings for the protection of the public and also for informed consideration of these cases coming up for review by the courts.

Panhandle also contends that, if the new schedules of Gd-1 APPLICABLE (c) could not supersede or modify the provisions in the amended contract of August 31, 1935, unless such provisions were specifically found to be unjust, unreasonable, unduly discriminatory, or preferential, the Commission's order of November 2, 1945, supplied such a finding. In that order the Commission specifically found that the rate schedules tendered by Panhandle were in substantial compliance with the order of September 23, 1942. Panhandle argues that this constitutes a finding that these new provisions covering terms and conditions of service as well as rates were just and reasonable and not excessive.

This contention also has no merit. The findings must be express, precise, and clear. The order and findings of November 2, 1945, as well as of September 23, 1942, covered rates and charges but not terms and conditions of service. The two subjects are not identical and they are covered by separate paragraphs of the statute. Section 717c (a) provides that "All rates and charges made, demanded or received . . . shall be just and reasonable. . . ." Section 717d provides that, in case any contract or any practice affecting such rate or charge is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable practice or contract to be thereafter observed. This provision applies to terms and conditions of service. The statute contains no express definition of "rates and charges" but each of the two words bears a dollars and cents connotation. Web-

ster's New International Dictionary, 1955. Section 717c carries out that connotation [9] for it contemplates that the rates and charges in question can be "received." While Gd-1 RATE (a) fixes rates and charges which may be "received," 1.85 or 2.6 as the case may be, Gd-1 APPLICABLE (c) describes nothing that can be received and fixes no rates and charges.

What Panhandle in effect contends is that a paragraph of a rate schedule which fixes no rates and charges but fixes terms and conditions of service, namely, Gd-1 APPLICABLE (c), is validated by an order which relates only to rates and charges. This contention cannot be sustained under the statute and the applicable decisions.

Moreover, during the hearings upon the new rates submitted by Panhandle, including Gd-1 APPLICABLE (c), the Commission at no point indicated that terms of resale by the utility to large industrial consumers were under consideration. In fact, it indicated the contrary, repeatedly stating in various orders that only rates were being considered. Thus, on September 14, 1945, the Commission ordered that the hearing on Panhandle's proposed new schedule "shall be limited to matters relating to proper rates which will comply with the Commission's interim order of September 23, 1942. The Commission reserves all other matters for later consideration." In the order of November 2, 1945, approving the rates in the proposed schedule, the Commission states that the preceding hearing "was limited to matters relative to proper rates. . . ." On August 6, 1946, in an order for a hearing regarding terms and conditions of service the Commission stated:

> "(d) The public hearing held pursuant to the Commission's order of September 14, 1945, was not concerned with matters relating to terms and conditions of service embodied in the rate schedules under consideration. . . ."

The fact, then, that the Commission in its order of November 2, 1945, states that the rates offered by Panhandle

are in substantial compliance with its order of September 23, 1942, does not constitute a finding that provisions or practices concerning terms and conditions of service are included in the rates which had previously been found to be unjust, unduly unreasonable, discriminatory, and preferential nor that new provisions covering terms and conditions of service are determined to be "just and reasonable." Section 717d. Since the order of 1942 did not refer to nor cover terms and conditions [10] of service, the approval of the rates in the order of November 2, 1945, as being in full compliance with the order of 1942 does not cover and validate the provisions as to resale in Gd-1 APPLICABLE (c). Moreover, the lack of essential findings on this point was not cured by the Commission's letter of August 8, 1947. The failure of the Commission in its order of November 2, 1945, to distinguish between rates and charges and terms and conditions of service detracted from the definiteness of that order and lends support to the District Court's conclusion that Consolidated may thereby have been misled and prevented from filing timely application for rehearing and timely appeal from the order of November 2, 1945.

This consideration is not conclusive. The decisive point is that the District Court's holding that Gd-1 APPLICABLE (c) had no legal effect was correct under the statute and the pertinent adjudications. *Colorado-Wyoming Gas Co.* v. *Federal Power Commission, supra,* 634; *Atchison, Topeka & Santa Fe* v. *United States, supra,* 201, 202. As Panhandle's obligation to deliver limited amounts of gas for resale under the new schedules was not based upon the essential statutory findings, the order was not effective to supersede the contractual obligations of the amended agreement of 1935 between Panhandle and Consolidated and Panhandle had no cause of action under Gd-1 APPLICABLE (c). Since Counts I, II, III, and V are all based upon the alleged violation of Gd-1 APPLICABLE (c), the judg-

ment of the District Court on these four counts must be affirmed.

In Count VII Panhandle avers that Consolidated unlawfully inflated the daily "base load" applicable to sales by Panhandle for the period from October 1, 1948, through September 30, 1949, by excluding from its computation of the daily "base load" the days in July, August, and September, 1948, when Panhandle delivered less than 125,000,000 cubic feet per day to Consolidated. The District Court held that these days should be excluded in the "base load" computation upon the ground that the Commission's order expressly provided for such exclusion. This part of the judgment was correct and is affirmed.

On Counts IV and VI the court rendered judgment for Panhandle, denying interest to Panhandle, however, prior to the date of the entry of judgment. This ruling as to interest is in conformity with the amended contract of August 31, 1935, and is correct.

[11] The amounts sued for in these counts are admitted to be due for gas delivered by Panhandle to Consolidated, but were withheld by Consolidated as claimed setoff for Panhandle's deficiencies in deliveries from July 23, 1948, through October 31, 1948, because of which Consolidated says it was compelled to manufacture gas at increased cost in order to supply its customers. The setoff is asserted as a defense to Counts IV and VI. Also an affirmative cause of action based on deficiency deliveries by Panhandle to Consolidated for separate periods from December 19, 1946, to October 31, 1948, is asserted in Consolidated's counterclaim.

Consolidated contends (1) that in view of the contract of August 31, 1935, as amended, particularly Articles X, XV, and XVIII, Panhandle is liable for all shortages below the 125,000,000 cubic feet per day provided in the contract if Panhandle was negligent or failed to use diligence so as to prevent such shortages; (2) that under the Commission's

order of July 17, 1948, if Panhandle made available to its firm customers east of Edgerton less than the delivery capacity of its system east of Edgerton, it violated the Commission's order of July 17, 1948, and is liable under Paragraph 4 of Article XVIII of the contract of August 31, 1935, to reimburse Consolidated for the expense caused by such shortages.

The principal provisions of the amended contract of August 31, 1935, which Consolidated claims were still in force after July 17, 1948, and establish Panhandle's liability for deferred deliveries, are in brief as follows: Under Article X Panhandle agreed to construct pipe lines and to hold or have available gas acreage and production facilities sufficient to supply Consolidated and its other customers with a continuous supply of gas. Under Article XVIII if Panhandle failed to deliver gas in the volume agreed, it was required, with an exception not material here, to reimburse Consolidated for the expense of manufacture or purchase to remedy the deficiency.

The order of July 17, 1948, was entered in various consolidated proceedings, covering transactions in eight states. Among other things it authorized curtailing deliveries by Panhandle to Consolidated and Michigan Gas Storage. In its Opinion 166 filed July 17, 1948, in conformity to which the order of July 17, 1948, was entered, the Commission declared:

> "We find that the practice of Panhandle in permitting Consolidated to take 125,000 Mcf a day, [12] while delivering to Gas Storage something less than the quantity to which it is entitled under its gas purchase contract, has the effect of granting to Consolidated an undue preference and advantage, and subjects Gas Storage to undue prejudice and disadvantage."

The order of July 17, 1948, was based on proper hearings and express findings and, as found by the District Court, was clearly valid in the modification which it imposed upon Panhandle's contractual obligation to deliver

125,000,000 cubic feet of gas per day to Consolidated. The order also freed Consolidated from any restriction as to locality of resale and permitted Panhandle to establish physical controls upon delivery of gas in Detroit. However, the order of July 17, 1948, made no findings as to other provisions of the contract between Panhandle and Consolidated excepting those which relate to the amount, volume, and method of delivery described above. Neither the order nor Opinion 166 in terms modified or considered Sections X, XV, or XVIII of the amended contract of August 31, 1935. In its Opinion 166-A issued August 25, 1948, the Commission declared:

> "The Commission's order of July 17, 1948, which prescribes the manner in which Panhandle shall make deliveries of natural gas to Michigan Consolidated and Michigan Gas Storage Company effectively modifies all provisions of Panhandle's Rate Schedule FPC No. 12, and supplements thereto which may be inconsistent with the provisions of that order including Panhandle's obligation to deliver 125,000 Mcf per day and including Paragraph 4 of Article XVIII of the contract of August 31, 1935 (Panhandle's Rate Schedule FPC No. 12), and Supplement No. 11 to such rate schedule accepted for filing under Commission order of July 23, 1948, likewise modifies any provision in such rate schedule inconsistent therewith."

Since Article XVIII was not mentioned in the findings of the order of July 17, 1948, this interpretation by the Commission made in its Opinion 166-A has no legal effect. *Atchison, Topeka & Santa Fe Railway Co.* v. *United States, supra.* The Commission is not authorized to interpret the legal effect of its own orders or alleged violations thereof [Cf. *Michigan Consolidated Gas Co.* [13] v. *Federal Power Commission,* 167 Fed. (2d) 264 (C. A. D. C.)], nor to extend their legal scope.

The order did effectively supersede Panhandle's contractual obligation to deliver 125,000,000 cubic feet of gas per day during the period described therein, namely, July

17, 1948, to October 31, 1948. The order affected and curtailed the amount of delivery but did not alter liability of Panhandle under Article XVIII of the contract of August 31, 1935, for damages caused by wrongful deficiencies in delivery.

Concerning Consolidated's contention that the shortage of gas delivered to Consolidated was caused by Panhandle's neglect or deliberate failure to provide itself with adequate facilities at the Edgerton Station as required by the contract, we think that the District Court properly declined to assume jurisdiction. The problems involved under these particular allegations in Consolidated's answer and counterclaim involved, as the District Court observed, "intricate problems of service as between different users and different geographical sections" and required for their decision the technical understanding and expert knowledge of the Commission. The transactions covered by certain of the Commission's orders included in the record and directly relevant involve eight states and great metropolitan areas. The problems of changing industrial conditions and growing needs for natural gas both territorially and otherwise are so extensive they do not lend themselves in the first instance to hearing before a court and require the expertise of the Commission. We think this is true, although this case presents actions for damages and not an action for specific performance as in *Michigan Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company, supra.*

However, we differ from the District Court's conclusion that Consolidated has no defense to Counts IV and VI and no cause of action under the Commission's order of July 17, 1948, and that the District Court has no jurisdiction of that question.

Consideration as to whether Panhandle has not complied with the order of the Commission and has breached the provision for reimbursement embodied in Article XVIII

of the contract of August 31, 1935, presents the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge. The exercise of the administrative power and discretion of the Commission is in no way involved. Cf. *Pennsylvania Railroad Company* v. *Puritan Coal* [14] *Mining Company*, 237 U. S. 121; *Great Northern Railway Company* v. *Merchants Elevator Company*, 259 U. S. 285. Moreover, a determination of these questions by the court could result in no undue preference as the Commission in its order of July 17, 1948, has fixed the priorities to be followed.

Under the order of July 17, 1948, construed with Article XVIII of the contract of August 31, 1935, still in force during the period involved, Consolidated has a valid cause of action against Panhandle. The deficiencies in delivery are admitted and the asserted liability of Panhandle for reimbursement of expenses of manufacture exists if the order of July 17, 1948, was violated by Panhandle.

This order required Panhandle to make deliveries to Consolidated at Detroit and to Michigan Gas Storage, both of which were firm customers, entitled to uninterrupted deliveries for the emergency period of "such volumes of natural gas as may be available after making deliveries to all of its other customers east of its Edgerton Compressor Station" in certain percentages not here material. Panhandle claims that since it made deliveries in the specific percentages to Consolidated and Gas Storage it complied with the order and Consolidated conceded at the trial that the percentages were followed in the deliveries. This order was in conformity with FPC Opinion No. 166 issued July 17, 1948, in which the Commission stated, "since the station capacity is based upon estimates similar to those which have frequently in the past proved substantially below performance, we are unwilling to make a finding with respect to the availability east of Edgerton Station of specific volumes of gas. Rather we believe that Panhandle will exert every reasonable effort to deliver through

that station the largest volumes of gas possible; and we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries pursuant to the provisions of effective tariffs and contracts."

We construe the order as granting to Consolidated and Michigan Gas Storage priorities over interrupticle customers west of Edgerton in the volume of gas to be delivered by Panhandle at Edgerton up to the capacity of that station. It follows that, if Panhandle failed to deliver to Consolidated and Gas Storage in the percentages established and up to the capacity of Edgerton Station such volumes of natural gas as were available after making deliveries to Panhandle's other customers [15] east of Edgerton Station, Panhandle is liable under Article XVIII of the contract of August 31, 1935, to reimburse Consolidated for such deficiencies. The withholding of amounts adequate for reimbursement, if the right to reimbursement is established, is expressly authorized by the contract and constitutes a valid defense to Counts IV and VI.

Consolidated also asserts a cause of action in its counterclaim for additional amounts which it claims to have expended due to the deficient deliveries of Panhandle during this period from December 19, 1946, to October 31, 1948. The deficiencies arising in 1946 and 1947 were under the emergency orders in force during these years, which specified definite standards of curtailment in delivery.

The District Court held that it had no jurisdiction to consider this question. For the reasons stated above we think this was error.

Having ruled that it had no jurisdiction to decide Consolidated's claim of setoff and of affirmative recovery under the counterclaim the District Court denied two motions for discovery led by Consolidated. The court thus refused to permit Consolidated, among other things, to prove the capacity of the Edgerton Station and to prove how much

interruptible gas was delivered west of Edgerton by Panhandle during the emergency period out of the volume which was properly available at the Edgerton Station. Panhandle's records showed that the deliveries of the Edgerton Station often exceeded 285,000,000 cubic feet per day. The Commission in its Opinion 166 stated that 270,000,000 cubic feet of gas per day was not the capacity of Edgerton and that a substantially larger volume of gas could be delivered through that compressor station. This conclusion is amply sustained by the record. On May 31, 1948, 296,000,000 cubic feet were delivered through Edgerton. This "abnormal" delivery was ascribed by Panhandle's witness "to the reduction of takes of gas by industrial customers served west of Edgerton." On 21 out of 100 days covered by the emergency order Panhandle delivered more than 285,000,000 cubic feet, and on some days exceeded 290,000,000 cubic feet. However, in October, 1948, for a number of days the deliveries fell below 270,000,000 cubic feet per day. These figures are taken from Panhandle's records. They support Consolidated's contention that Edgerton had a capacity much over 270,000,000 cubic feet per day and that Panhandle did not on the days listed comply with the Commission's order.

[16] Panhandle contended that Consolidated's motions for discovery upon these questions should be refused because they were not relevant. If we are correct in our conclusion that under the Commission's order of July 17, 1948, firm customers of Panhandle east of Edgerton had a priority over interruptible customers of Panhandle west of Edgerton to the extent of Edgerton's total capacity, then Panhandle's record of interruptible deliveries west of Edgerton for the period involved was directly relevant. The issue was whether Panhandle complied with the order of July 17, 1948. Upon that point the question whether the deficiency was caused or contributed to by Panhandle's diversion of millions of cubic feet of gas per day west of Edgerton to interruptible customers was relevant. As the

District Court had jurisdiction of Consolidated's defense stated in Counts IV and VI, judgment as to these counts must be reversed. For the same reason judgment must be reversed as to the counterclaim. The case must be remanded for new trial on Counts IV and VI and the counterclaim, with direction to consider the actions and defenses pleaded and to consider the motions for discovery and make such order thereunder as is proper in accordance with Rule 34 of the Federal Rules of Civil Procedure.

The judgment is affirmed as to Counts I, II, III, V and VII and reversed as to Counts IV and VI and as to the counterclaim.

The case is remanded to the District Court for further proceedings in accordance with this opinion.

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[17]

Causes Argued and Submitted

February 4, 1955—Before: Allen, Miller and Stewart, Circuit Judges.

These causes are argued by Walter M. Meek for Michigan Consolidated and by Henry C. Bogle for Panhandle Eastern and are submitted to the court.

Judgment

Case No. 12,200

(Filed August 1, 1955)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby

affirmed as to Counts I, II, III, V, and VII and reversed as to Counts IV and VI and as to the counterclaim.

The case is remanded to the District Court for further proceedings in accordance with the opinion herein.

Judgment

Case No. 12,201

(Filed August 1, 1955)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was [18] argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as to Counts I, II, III, V, and VII and reversed as to Counts IV and VI and as to the counterclaim.

The case is remanded to the District Court for further proceedings in accordance with the opinion herein.

[19]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Consolidated Gas Company, No. 12200, Appellant,

v.

Panhandle Eastern Pipe Line Company, Appellee.

Panhandle Eastern Pipe Line Company, Appellant,

v.

Michigan Consolidated Gas Company, No. 12201, Appellee.

Before ALLEN, MILLER, and STEWART, Circuit Judges.

ORDER

Filed October 6, 1955

The petition for submission of the petition for rehearing to the entire bench is denied.

The opinion is modified by striking therefrom sentence No. 2 in paragraph No. 3 of page 10 and vy substituting therefor the following sentence:

> The District Court held that these days should be excluded in the "base load' computation upon the ground that the Commission's order of November 2, 1945, which approved and adopted RATE SCHEDULE Gd-1, provided for such exclusion.

The petition for rehearing is denied.

Approved for entry:

.....

United States Circuit Judge

[20]

Nos. 12200, 12001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Consolidated Gas Company, No. 12200, Appellant,

v.

Panhandle Eastern Pipe Line Company, Appellee.

Panhandle Eastern Pipe Line Company, Appellant,

v.

Michigan Consolidated Gas Company, No. 12201, Appellee.
Before ALLEN, MILLER, and STEWART, Circuit Judges.

MEMORANDUM ON PETITION FOR REHEARING

Filed October 6, 1955

ALLEN, Circuit Judge. The application for submission of the petition for rehearing to the entire bench is denied. We recently held "that in cases where the appeal was heard, and the judgment or order complained of was decided, by a regular Court consisting of three judges only, a petition to rehear or to consider should not be considered by the Court en banc." *N.L.R.B.* v. *Cambria Clay Products Co.*, 12072, order entered August 12, 1955; *Northwest Air Lines, Inc., et al.* v. *Glenn L. Martin Co.*, 12130, order entered October 3, 1955.

[21] In the petition for rehearing filed by Panhandle many contentions advanced by Panhandle at the hearing are reiterated. Each of these contentions was given ex-

tensive consideration and they will not be discussed here. We adhere to our position that Section 5 of the Natural Gas Act, 15 U.S.C. § 717d(a), governs these proceedings and that in the absence of the findings required under that paragraph Gd-1 APPLICABLE (c) has no force or effect. This disposes in this court of Counts I, II, III, and V of Panhandle's complaint, and subsidiary questions as to these Counts need not be debated. Neither *Mobile Gas Service Corporation* v. *Federal Power Commission,* 215 Fed. (2d) 883 (C. A. 3), nor *Tyler Gas Service Company* v. *United Gas Pipe Line Company,* 217 Fed. (2d) 73 (C. A. 5), involves our precise question and they have no direct bearing.

With reference to Counts IV and VI Panhandle again contends that it is not liable. It says that it was entitled under the Commission's order of July 17, 1948, to decide in its discretion how much gas it would distribute to Gas Storage and Consolidated. It adheres to the position stated in its main brief at the hearing that, after it had delivered to The Ohio Fuel Gas Company, to East Ohio Gas Company, and to its customers east of Edgerton other than Consolidated and Gas Storage the various amounts required by the order, when it divided the balance of gas passing through Edgerton station between Consolidated and Gas Storage in the proper percentages, it had complied with its obligations under the order of July 17, 1948. Panhandle did not say at the hearing, it does not now say in the petition for rehearing, that it delivered gas up to the physical capacity of the Edgerton station. It relies on the [22] fact that the Commission refused an application of the Michigan Public Service Commission to include in its order of July 17, 1948, a provision specifically discontinuing deliveries to Panhandle's interruptible customers. However, the Commission in Opinion 166, which accompanied and laid the basis for the orders of even date therewith, namely, July 17, 1948,

declared that the contracts between Panhandle and Gas Storage and between Panhandle and Consolidated were firm contracts and assumed that in its operation Panhandle would give to the deliveries under such firm contracts "the degree of priority appropriate thereto * * *." (Opinion 166, 216a). It found that "during the present storage season Panhandle's delivery capacity on its system east of Edgerton, after deliveries to its other customers in that area, should then be made available to Consolidated and Gas Storage" in the percentages previously quoted in the opinion. (Opinion 166, 206a). It stated that "a dominant, if not controlling, factor with respect to the supply of gas available from Panhandle's system east of the Edgerton station is the physical capacity of that compressor station." (Opinion 166, 216a). We are cited to no statement of the Commission which indicates that Panhandle was given a discretion as to how much gas should pass through Edgerton. While the Commission did not determine the physical capacity of Edgerton, it found that it was greater than Panhandle's witness testified. The amounts to be delivered were not definite but the measurement was definite. It was to be up to the physical capacity of the station. In light of all the discussion bearing on this point in Opinion 166, we construe the phrase "physical capacity" as meaning the full capacity of the station.

[23] The decision of the Southern District Court of Illinois in *Federal Power Commission* v. *Illinois Power Company and Illinois Commerce Commission,* entered October 18, 1948, does not affect our conclusion. While the court stated that Panhandle in its discretion should determine initially when curtailments in interruptible service should be made and the manner and extent thereof, this finding was qualified by the holding that this was "subject to the provisions of the Natural Gas Act and the rules, regulations and orders of the Commission" issued thereunder. (278a, paragraph 15).

Panhandle objects to the opinion because it states as to Counts IV and VI that the deficiencies sued for are "admitted." This statement is correct. Panhandle does not assert that it delivered up to the full capacity of Edgerton station as was ordered by the Commission July 17, 1948. Since the order was to deliver to the full capacity of the station and Panhandle's own records show that this was not done, the deficiencies are admitted.

No evidence of damage was introduced by Consolidated under the counterclaim because it had been dismissed at the time of trial. Panhandle's contention that the reversal of judgment as to the counterclaim is incorrect because the gas claimed to have been manufactured was manufactured after the period of deficiency deliveries had ended, has no merit. Under the Commission's Opinion 16C Consolidated was specifically authorized to receive and store gas for winter requirements. (201a). The gas received and stored, if insufficient to meet demands of the winter, could be compensated for under Paragraph 4 of Article XVIII of the contract.

The petition for rehearing is denied.

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